Supreme Court, U.S.
FILED

No. 03 170 JUL 31 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

VINCENT MARQUEZ,

Petitioner,

v.

R. J. GUTIERREZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH C. MENNEMEIER
Counsel of Record
KRISTINE L. BURKS
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, California 95814
(916) 553-4000
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a prison official can act maliciously and sadistically for the very purpose of causing harm in violation of the Eighth Amendment and, at the same time, reasonably believe that his conduct is lawful such that he is immune from suit under the doctrine of qualified immunity, as to which the courts of appeals are in conflict.

PARTIES TO THE PROCEEDING BELOW

The petitioner in this Court, Vincent Marquez, was the plaintiff in the District Court and the appellee in the Court of Appeals. The respondent, R. J. Gutierrez, was the defendant in the District Court and the appellant in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
OPINIONS BELOW	1
JURISDICTIONAL BASIS	1
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. THE NINTH CIRCUIT'S DETERMINATION THAT A PRISON OFFICIAL CAN ACT MALICIOUSLY AND SADISTICALLY FOR THE VERY PURPOSE OF CAUSING HARM WHILE, AT THE SAME TIME, BELIEVING THAT HIS CONDUCT IS LAWFUL IS IN DIRECT CONFLICT WITH RULINGS IN THE ELEVENTH CIRCUIT	5
II. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S QUALIFIED IMMUNITY RULINGS	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES:

Crawford-El v. Britton, 523 U.S. 574 (1998) 9

Despain v. Uphoff, 264 F.3d 965 (10th Cir. 2001) 8

Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043 (9th Cir. 2002) 6, 10

Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001) 8

Graham v. M.S. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) 6

Hope v. Pelzer, 536 U.S. 730 (2002) 8

Hudson v. McMillian, 503 U.S. 1 (1992) 7, 8, 10

Johnson v. Breeden, 280 F.3d 1308 (11th Cir. 2002) ...6, 7, 9

Marquez v. Gutierrez, 322 F.3d 689 (9th Cir. 2003).....1, 4, 5, 6, 10

Saucier v. Katz, 533 U.S. 194 (2001) 4, 6, 8, 11

Skrtich v. Thorton, 280 F.3d 1295 (11th Cir. 2002) 7

Treats v. Morgan, 308 F.3d 868 (8th Cir. 2002) 8

Whitley v. Albers, 475 U.S. 312 (1986).....7, 8, 10

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment VIII .....*passim*

STATUTES:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983..... 2

OPINIONS BELOW

The Court of Appeals opinion that Mr. Marquez asks this Court to review is *Marquez v. Gutierrez*, 322 F.3d 689 (9th Cir. 2003). The District Court opinion is *Marquez v. Gutierrez*, Order After Hearing, Civ. S-96-457 LKK/GGH P (E.D. Cal. Dec. 3, 2001). Both opinions are reproduced in the Appendix.

JURISDICTIONAL BASIS

The Ninth Circuit filed its decision on March 6, 2003. Judgment was entered that same day. On May 18, 2003, Justice Sandra Day O'Connor signed an order extending the time for filing this petition for certiorari to and including July 5, 2003. On June 2, 2003, Justice Sandra Day O'Connor signed a second order extending the time for filing this petition for certiorari to and including August 3, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeals' decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

42 U.S.C. § 1983:

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Vincent Marquez, is a California state inmate. The respondent, R. J. Gutierrez, is a correctional officer. Mr. Marquez sues Mr. Gutierrez alleging, *inter alia*, that Mr. Gutierrez violated his Eighth Amendment right to be free from the use of excessive force by shooting him during a prison disturbance without justification and while he was unarmed. The prison disturbance occurred on August 28, 1995 and consisted of several fist-fights involving approximately ten inmates.

Mr. Gutierrez contends that he shot Mr. Marquez because he observed Mr. Marquez and another inmate, Bruno Garcia, kicking a third inmate, "Perez," in the "head area" and feared that Perez might die or suffer great bodily harm as a result. Mr. Marquez denies hitting or kicking anyone during the course of the fighting. The other alleged assailant, Garcia, informed prison investigators on at least two separate occasions that he alone kicked Perez, and that Mr. Marquez was three or four yards away at the time. Indeed, when questioned about the incident, Garcia stated, "I don't know why they shot the other guy, I was the one they should have shot." Moreover, Mr. Gutierrez concedes that he did not actually see Mr. Marquez kick Perez in the head as his view was obscured, and that he "could not tell how much damage was actually being done." Following the incident, Perez was treated for "superficial" wounds and released. Although Perez admits to being face down on the ground prior to the shot being fired, he told prison investigators that he was on his hands and knees attempting to get up at the time the shot was fired. Furthermore, according to Garcia, Perez was not lying motionless, but was "flailing his arms to ward off the kicks."

Mr. Gutierrez moved for summary judgment on qualified immunity grounds.[1] The District Court denied the motion, finding he was not entitled to qualified immunity because (1) viewed in a light most favorable to Mr.

[1] Mr. Gutierrez also moved for summary judgment on the ground that Mr. Marquez failed to state a constitutional violation. His motion was denied as to this ground as well; however, he did not appeal that portion of the District Court's ruling.

Marquez, Mr. Gutierrez's conduct violated Mr. Marquez's rights under the Eighth Amendment, (2) the Eighth Amendment protections afforded inmates during violent prison disturbances were clearly established at the time Mr. Marquez was shot, and (3) a triable issue of material fact exists as to whether Gutierrez could have reasonably believed his conduct was lawful.[2] App. 10.

Mr. Gutierrez appealed the District Court's denial of summary judgment on qualified immunity grounds. The Court of Appeals reversed the District Court, finding Mr. Gutierrez was entitled to qualified immunity. *Marquez*, 322 F.3d at 693, App. 7. In reaching this conclusion, the Court of Appeals relied on this Court's ruling in *Saucier v. Katz*, 533 U.S. 194 (2001), which set forth the analytical sequence for courts required to rule upon the qualified immunity issue. The initial inquiry is whether "[t]aken in the light most favorable to the party asserting the injury, [ ] the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If the answer is yes, the next step is "to ask whether the right was clearly established." *Id.* In making this determination, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

The Court of Appeals found that "to shoot a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in

---

[2] Having so found, the District Court did not reach Mr. Marquez's broader contention that a prison official cannot act maliciously and sadistically and, at the same time, reasonably believe that his conduct conforms to clearly established law.

danger of great bodily harm," as alleged by Mr. Marquez, "would inflict unnecessary and wanton pain" in violation of the Eighth Amendment. *Marquez*, 322 F.3d at 692, App. 5. The Court of Appeals also concluded that the law governing prison officials' conduct was clearly established at the time of the shooting. *Marquez*, 322 F.3d at 692, App. 5. Nevertheless, the Court of Appeals held that Mr. Gutierrez was entitled to qualified immunity because "[a] reasonable official standing where Gutierrez was standing – that is, in a tower located 360 feet away from the disturbance – could perceive that both Marquez and another inmate were kicking Perez and threatening Perez with serious injury or death, and that Perez was not capable of protecting himself, even if no kick was actually administered by Marquez. . . . In that light, a reasonable officer could believe that shooting one inmate in the leg to stop an assault that could have seriously injured or killed another inmate was a good faith effort to restore order, and thus lawful." *Marquez*, 322 F.3d at 693, App. 6-7.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DETERMINATION THAT A PRISON OFFICIAL CAN ACT MALICIOUSLY AND SADISTICALLY FOR THE VERY PURPOSE OF CAUSING HARM WHILE, AT THE SAME TIME, BELIEVING THAT HIS CONDUCT IS LAWFUL IS IN DIRECT CONFLICT WITH RULINGS IN THE ELEVENTH CIRCUIT

There is a direct conflict in the rulings of the Ninth and Eleventh Circuits on the question presented by this petition – whether a prison official can act maliciously and

sadistically for the very purpose of causing harm in violation of the Eighth Amendment and, at the same time, reasonably believe that his conduct is lawful such that he is immune from suit under the doctrine of qualified immunity. The Ninth Circuit says "yes." The Eleventh Circuit says "no."

In ruling that Mr. Gutierrez is entitled to qualified immunity, the Court of Appeals summarily rejected Mr. Marquez's contention that a prison official could not act maliciously and sadistically while, at the same time, believing his conduct lawful, concluding "this is the same argument that the Supreme Court rejected in *Saucier*, and that we rejected in *Estate of Ford* [*v. Ramirez-Palmer*, 301 F.3d 1043 (9th Cir. 2002)]." *Marquez*, 322 F.3d at 693, App. 6.

The Eleventh Circuit reached the opposite conclusion in *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002), holding that where an Eighth Amendment excessive force violation is established, "there is no room for qualified immunity." *Id.* at 1321. In so holding, the Eleventh Circuit distinguished this Court's decision in *Saucier* as follows:

> [*Saucier*] did not involve a constitutional tort with a subjective intent element. Instead, *Saucier* involved a Fourth Amendment claim of use of excessive force against an arrestee, and such claims are purely objective. They turn solely on the objective reasonableness of the amount of force used in the circumstances, regardless of the intent or other subjective state of mind of the defendant officer. *See Graham v. M.S. Connor*, 490 U.S. 386, 395-98, 109 S. Ct. 1865, 1871-72, 104 L. Ed. 2d 443 (1989). It makes perfect sense to conclude, as the Supreme Court did in *Saucier*, that with such claims the merits issue and the

> qualified immunity issue are distinct, so that the existence of a valid Fourth Amendment excessive force claim is not inconsistent with qualified immunity. . . .
>
> It is different with claims arising from the infliction of excessive force on a prisoner in violation of the Eighth Amendment Cruel and Unusual Punishment Clause. In order to have a valid claim on the merits of excessive force in violation of that constitutional provision, the excessive force must have been sadistically and maliciously applied for the very purpose of causing harm. Equally important, it is clearly established that all infliction of excessive force on a prisoner sadistically and maliciously for the very purpose of causing harm and which does cause harm violates the Cruel and Unusual Punishment Clause. So, where this type of constitutional violation is established there is no room for qualified immunity. It is not just that this constitutional tort involves a subjective element, it is that the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* [*v. McMillian*, 503 U.S. 1 (1992)] and *Whitley* [*v. Albers*, 475 U.S. 312 (1986)].

Johnson, 280 F.3d at 1331-32; *see also Skrtich v. Thorton*, 280 F.3d 1295, 1301 (11th Cir. 2002) ("In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force 'maliciously and sadistically

to cause harm' is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* and *Whitley*.")[3]

The Ninth Circuit's decision stands alone among those of the other circuits. While no circuit court, other than the Eleventh Circuit, has held that an Eighth Amendment excessive force violation and qualified immunity are mutually exclusive, Mr. Marquez's counsel was unable to locate a single federal appellate court decision outside the Ninth Circuit holding that an officer is entitled to qualified immunity where an Eighth Amendment excessive force violation has been established. To the contrary, every federal appellate court that has found an Eighth Amendment excessive force violation on the facts alleged has concluded that qualified immunity is unavailable. *See, e.g., Hope v. Pelzer*, 536 U.S. 730 (2002); *Treats v. Morgan*, 308 F.3d 868 (8th Cir. 2002); *Despain v. Uphoff*, 264 F.3d 965 (10th Cir. 2001); *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001). This is hardly surprising given that the unlawfulness of an act done maliciously and sadistically for the purpose of causing harm would be obvious. As this Court explained, "when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Hudson*, 503 U.S. at 9 (citing *Whitley*, 475 U.S. at 327).

---

[3] In *Saucier*, Justices Ginsburg, Stevens and Breyer expressed the opinion that "an officer whose conduct is objectively unreasonable [under the Fourth Amendment] should find no shelter under a sequential qualified immunity test." *Saucier*, 533 U.S. at 214 (Ginsberg, J., concurring).

The number of cases brought by inmates charging prison officials with using excessive force in violation of the inmates' Eighth Amendment rights are too numerous to cite and will only grow as the number of incarcerated persons continues to increase. This Court should clarify the availability of qualified immunity to officials accused of such violations. In the absence of such clarification inmates and officials alike will be subjected to inconsistent results depending upon the circuit in which they reside.

II. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S QUALIFIED IMMUNITY RULINGS

In order to find that a prison official used excessive force in violation of the Eighth Amendment, a court must necessarily find that the official acted maliciously and sadistically for the very purpose of causing harm. Having made such a finding, a court simply cannot conclude that the official is entitled to qualified immunity because a reasonable officer could not believe that his malicious and sadistic act done for the very purpose of causing harm was lawful. A court cannot "ignore the subjective purpose or motivation implicit in the standard and only decide whether a reasonable official in the defendants' circumstances and acting without a bad purpose (a purpose to punish) could have believed that [his conduct] was lawful." *Johnson*, 280 F.3d at 1320 (citing *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996)). A defendant's subjective intent is relevant to the qualified-immunity defense where it is an element of the alleged constitutional violation. *See Crawford-El v. Britton*, 523 U.S. 574, 589 & n.11 (1998).

When the subjective intent element is taken into account, there is no question that Mr. Gutierrez's conduct

violated clearly established law because a reasonable officer could never believe that "shoot[ing] a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm" is lawful. *See Hudson*, 503 U.S. at 5; *Whitley*, 475 U.S. at 319.

The Ninth Circuit erred by recasting the facts and taking all inferences in Mr. Gutierrez's favor in determining that a reasonable officer could have believed his conduct lawful. As the Ninth Circuit acknowledges, "courts must still consider whether – assuming the facts in the injured party's favor – it would be clear to a reasonable officer that his conduct was unlawful." *Estate of Ford*, 301 F.3d at 1045. Yet the Ninth Circuit failed to do so in this case. Having found an Eighth Amendment violation on the facts as alleged – "shoot[ing] a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm" – the court disregarded those facts and recast them in the light most favorable to Mr. Gutierrez. The Ninth Circuit's finding that a reasonable officer could have believed his conduct lawful is predicated on a finding that "[a] reasonable official standing where Gutierrez was standing – that is, in a tower located 360 feet away from the disturbance – could perceive that both Marquez and another inmate were kicking Perez and threatening Perez with serious injury or death, and that Perez was not capable of protecting himself, even if no kick was actually administered by Marquez." *Marquez*, 322 F.3d at 693, App. 6-7. Yet those are not the facts alleged.

The reasonable "mistake" the Ninth Circuit's opinion allows for is not as to the *law*, which is what qualified

immunity allows for, but is as to the *facts*. Should a jury find that the facts were as the Ninth Circuit recast them, there would be no Eighth Amendment violation in the first place, and the inquiry would end. That, however, is a job for the trier of fact, not the court. When the facts are construed in Mr. Marquez's favor, as *Saucier* requires, there is no room for a mistake as to what the law requires. At the time of the shooting, the law clearly prohibited malicious and sadistic acts done for the purpose of causing harm, including but not limited to, "shoot[ing] a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm."

CONCLUSION

This petition presents a recurring issue of significant importance over which there exists a direct conflict among the circuit courts. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

KENNETH C. MENNEMEIER
Counsel of Record
KRISTINE L. BURKS
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, California 95814
(916) 553-4000
Counsel for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT MARQUEZ,
Plaintiff-Appellee,

v.

R J GUTIERREZ,
Defendant-Appellant,

and

JAMES GOMES; THEO WHITE, Warden; M BISHOFF; D ARMENDARIZ; SUZAN HUBBARD, Warden; S J VANCE; C JOHNSON; L DR HELDER; W V SANDT; D H MOEHRING; E A CONNOLLY; S WILLIAMS; GEORGE M GALAZA; L LOO; R HARWAY; K KELLAWAN; B BYNAM,
Defendants.

No. 02-15017

D.C. No
CV-96-00457-LKK

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Argued and Submitted
February 13, 2003 – San Francisco, California

Filed March 6, 2003

Before: Stephen S. Trott, Pamela Ann Rymer, and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Rymer

COUNSEL

Stephen W. Perkins, Deputy Attorney General, Sacramento, California, for the defendant-appellant.

Kenneth C. Mennemeier and Kristine L. Burks, Mennemeier, Glassman & Stroud, Sacramento, California, for the plaintiff-appellee.

OPINION

RYMER, Circuit Judge:

Correctional Officer Richard Gutierrez appeals the district court's denial of his motion for summary judgment on the ground of qualified immunity, which he filed in defense of a § 1983 action brought by an inmate, Vincent Marquez, whom he shot in the leg during a prisoner melee at the California State Prison-Sacramento (CSPS). The district court found triable issues of fact regarding the need for this force and the threat that Gutierrez reasonably perceived, leading it to conclude that genuine factual disputes exist as to Marquez's excessive force claim under the Eighth Amendment *and* as to Gutierrez's entitlement to qualified immunity. However, in doing so the district court collapsed the qualified immunity inquiry and the constitutional inquiry rather than treating them separately, as *Saucier v. Katz,* 533 U.S. 194 (2001), *Jeffers v. Gomez,* 267 F.3d 895, 903 (9th Cir. 2001), and *Estate of Ford v. Ramirez-Palmer,* 301 F.3d 1043, 1050-53 (9th Cir. 2002), which applies *Saucier* to the Eighth Amendment but was rendered after the district court's decision in this case, instruct. Analyzing the inquiries separately, we conclude that, assuming the facts in Marquez's favor, an Eighth Amendment violation would exist but a reasonable officer in Gutierrez's position would have believed that his

response was a good faith effort to restore discipline. Accordingly, we reverse.

I

A disturbance broke out in the prison yard at CSPS on August 28, 1995. Marquez claims that he was attacked by a group of unarmed inmates, but took no violent action himself. An inmate, J. Perez, ended up lying on the ground while being kicked in the head by two other inmates, one of whom (Bruno Garcia) later said that he "was the one they should have shot." Marquez states that he was standing three to four feet away from Perez. He also states that Perez sought to defend himself, and was not unconscious as Gutierrez thought. Gutierrez was stationed in a guard tower located some 360 feet away from the disturbance. He yelled "Yard down!" once he saw the fight erupt, but none of the combatants complied with his order or with a similar order made by a different officer. He then saw Perez lying on the ground, being kicked in the head with hard boots by two inmates, one of whom he claims was Marquez. Gutierrez yelled "Get down!" to no result, and then intentionally shot Marquez in the leg. Marquez suffered a fractured femur, and brought suit charging Gutierrez with excessive use of force in violation of the Eighth Amendment.

Gutierrez moved for summary judgment, which the district court denied. Gutierrez timely brought this interlocutory appeal.

II

Marquez questions our jurisdiction to review the district court's denial of qualified immunity based on the

existence of a triable issue of fact regarding Gutierrez's intent. Intent is an element in this case because "[w]here a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Whitley v. Albers,* 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973)). But even when intent is an element of the constitutional tort, we have jurisdiction to determine whether there is a genuine issue of material fact as to it. *Jeffers,* 267 F.3d at 910. Thus, although the parties dispute the identity of the inmate who kicked Perez, and what Gutierrez saw, we may assume these disputed facts in Marquez's favor in order to decide whether qualified immunity was properly denied. *Id.*

III

Following *Saucier*, *Jeffers*, and *Ford*, we first determine whether the facts, viewed in the light most favorable to Marquez, show that Gutierrez violated Marquez's Eighth Amendment rights. Marquez argues that the test set out in *Whitley* applies. We agree. Therefore, to decide whether a particular use of force evinces wantonness, we consider the objective need for force, the relationship between any such need and the amount of force actually used, the threat reasonably perceived by the correctional officer, whether the officer took efforts to temper the severity of his response, and the extent of the inmate's injury. *Whitley,* 475 U.S. at 320-21. Mindful of the Supreme

Court's admonition that we must be hesitant "to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance," *id.* at 320, still we believe that on Marquez's version of the facts the Eighth Amendment would be violated. To shoot a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm, would inflict unnecessary and wanton pain.

IV

Even though there would be a constitutional violation if Marquez were to prove the facts that he posits, Gutierrez may nevertheless be entitled to qualified immunity if a reasonable officer could have believed his conduct was lawful. The qualified immunity inquiry has two parts: "(1) Was the law governing the state official's conduct clearly established? (2) Under that law could a reasonable state official have believed his conduct was lawful?" *Jeffers,* 267 F.3d at 910 (quoting *Browning v. Vernon,* 44 F.3d 818, 822 (9th Cir. 1995)) (internal quotation marks omitted).

Gutierrez urges us to ask whether it was clearly established in 1995 that the use of firearms by a correctional officer during a violent prison disturbance to curtail life-threatening conduct was unlawful. However, we have already held in *Jeffers,* which also involved the shooting of an inmate during a prison disturbance, that the law governing prison officials' conduct was clearly established in *Whitley. Jeffers,* 267 F.3d at 910-11. *Whitley* was decided in 1986, so its rule was the controlling rule when the incident in this case occurred.

Gutierrez argues that he relied on the prison's use of force policy (the same policy as in *Jeffers*), which authorizes armed post officers to use firearms as a last resort if great bodily injury is occurring; that he was cleared of wrongdoing by the Departmental Shooting Review Board; and that a reasonable officer would believe that relying on the prison's shooting policy was lawful. He also maintains that the disputed facts are immaterial, in that it is the fact that Perez was being kicked that matters, not the identity of who was doing the kicking.

Marquez contends that Gutierrez could not have reasonably believed that his decision to shoot Marquez was lawful because he was not kicking Perez, because Perez was conscious and able to defend himself, and because Garcia admits that he "was the one they should have shot." Further, Marquez argues that a prison official cannot act maliciously and sadistically while, at the same time, reasonably believing that his actions conform to clearly established law. However, this argument is the same argument that the Supreme Court rejected in *Saucier,* and that we rejected in *Estate of Ford.* "Courts may not simply stop with a determination that a triable issue of fact exists as to whether prison officials [acted unconstitutionally]; instead, the qualified immunity inquiry is separate from the constitutional inquiry." *Estate of Ford,* 301 F.3d at 1053. Accordingly, Gutierrez's claim of qualified immunity is not defeated simply because a triable issue of fact exists as to whether his decision to shoot Marquez was malicious.

Even if Gutierrez's beliefs that Marquez was involved in the kicking incident and that Perez was in danger of serious harm were mistaken, he can still be entitled to qualified immunity. A reasonable official standing where

Gutierrez was standing – that is, in a tower located 360 feet away from the disturbance – could perceive that both Marquez and another inmate were kicking Perez and threatening Perez with serious injury or death, and that Perez was not capable of protecting himself, even if no kick was actually administered by Marquez. The scenario may look different when gauged against the "20/20 vision of hindsight," but we must look at the situation as a reasonable officer in Gutierrez's position could have perceived it. *Saucier,* 533 U.S. at 205 (quoting *Graham v. Connor,* 490 U.S. 386, 396 (1989)) (internal quotation marks omitted). In that light, we believe that a reasonable officer could believe that shooting one inmate in the leg to stop an assault that could have seriously injured or killed another inmate was a good faith effort to restore order, and thus lawful. *Cf. Jeffers,* 267 F.3d at 912 (holding that under *Whitley,* "a prison guard is permitted to use deadly force 'in a good faith effort to maintain or restore discipline'") (quoting *Whitley,* 475 U.S. at 320).

Accordingly, Gutierrez is entitled to qualified immunity.

REVERSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VINCENT MARQUEZ,
Plaintiff,
v.
R. J. GUTTIEREZ,
Defendant /

NO.
CIV. S-96-457 LKK/GGH P

ORDER AFTER HEARING

(Filed Dec. 3, 2001)

Defendant's motion for summary judgment came on regularly for hearing on November 28, 2001, before the Honorable Lawrence K. Karlton, Senior Judge. KRISTINE L. BURKS appeared for plaintiff; STEPHEN PERKINS appeared for defendant.

Upon consideration of the pleadings and papers on file herein, and after hearing the argument of counsel, the court announced its disposition of the motion and its reasons therefor into the record as follows:

Plaintiff sues defendant, a correctional officer, under 42 U.S.C. § 1983, for excessive force in violation of the Eighth Amendment. This matter comes before the court on defendant's motion for summary judgment, the standard for which is well-known and need not be repeated here. *See Rodgers v. County of Yolo*, 889 F. Supp. 1284 (E.D. Cal. 1995).

As the alleged violation occurred while plaintiff was incarcerated, plaintiff must establish a genuine issue of material fact that defendant's gunshot constituted an "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Force used in response to a prison disturbance is not "unnecessary and wanton" if "applied in a good faith effort to maintain or restore

discipline;" but only if applied "maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21. The court must infer whether the force was "maliciously and sadistically" applied by considering, (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of the injury inflicted; (4) the extent of the threat of the safety of the staff and inmates, as reasonably perceived by the responsible officials; and (5) efforts made to temper the severity of a forceful response. *See id.*

Here, there is no question that defendant inflicted severe injury upon the plaintiff, whose left femur was fractured by the bullet that passed completely through his leg.

There is a genuine issue of material fact regarding the need for this force and the threat defendant reasonably perceived. What, if anything, defendant actually saw from his vantage point some 360 feet away from a group of fighting inmates is in dispute. Defendant's account of observing plaintiff kick the head of a motionless inmate on the ground is called into doubt by evidence suggesting that plaintiff kicked no one, and that an inmate who actually was being kicked in a fight three or four yards away was flailing his arms and fighting off the kicks, an account supported by the fact that the inmate suffered only superficial injuries.

Finally, there is at least a genuine issue of material fact as to whether defendant made any effort to temper the severity of his response, as he did not issue his "yard down" warning over the PA to fighting inmates some 360 feet away, nor fire a warning shot, nor even lift the binoculars to his

eyes to determine the severity of the situation before firing.

Thus, under *Whitley*, a genuine issue of material fact remains as to plaintiff's Eighth Amendment excessive force claim.

Defendant also seeks qualified immunity. To determine whether a government officer is entitled to qualified immunity, the court must determine whether the defendant's conduct could have violated the plaintiff's constitutional rights, viewed in a light most favorable to the plaintiff. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). If so, the court must consider whether the right allegedly violated was clearly established at the time of the challenged actions, *id.*, and whether, under the circumstances, an officer could have reasonably believed his conduct was lawful. *Id.* at 2158.

As explained above, viewed in a light most favorable to the plaintiff, defendant's conduct violated plaintiff's rights under the Eighth Amendment. Further, "[t]he Eighth Amendment protections afforded inmates during violent prison disturbances," are clearly established. *Jeffers v. Gomez*, 267 F.3d 895, 910 (2001). Whether defendant reasonably believed his conduct was lawful depends on whether he indeed reasonably perceived that plaintiff was kicking the head of an inmate who was lying still on the ground. As this remains an issue of fact, this court cannot grant qualified immunity.

Accordingly, defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: November 28, 2001.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

United States Constitution, Amendment VIII

Bail – Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Code Annotated, Title 42

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
NOV 7 2003
OFFICE OF THE CLERK

No.03-170

In The
Supreme Court of the United States

VINCENT MARQUEZ, *Petitioner,*

v.

R. J. GUTIERREZ, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
FRANCES T. GRUNDER
Senior Assistant Attorney General
MICHAEL G. LEE
Supervising Deputy Attorney General
STEPHEN W. PERKINS
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-7487
Facsimile: (916) 324-5205
Attorneys for Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. THERE IS NO CIRCUIT SPLIT ON THE AVAILABILITY OF QUALIFIED IMMUNITY IN EIGHTH AMENDMENT EXCESSIVE FORCE CASES, AND THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.	4
II. THE NINTH CIRCUIT PROPERLY APPLIED *SAUCIER* BY ANALYZING HOW A REASONABLE OFFICER COULD HAVE PERCEIVED THE PRISON DISTURBANCE AND THE APPLICABLE LAW.	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Estate of Ford v. Ramirez-Palmer 301 F.3d 1043 (9th Cir. 2002)	6
Harlow v. Fitzgerald 457 U.S. 800 (1982)	6
Hope v. Pelzer 536 U.S. 730 (2002)	4, 5, 6, 9
Jeffers v. Gomez 267 F.3d 895 (9th Cir. 2001)	3, 8, 9
Johnson v. Breeden 280 F.3d 1308 (11th Cir. 2002)	5, 6
Marquez v. Gutierrez 322 F.3d 689 (9th Cir. 2003)	*passim*
Saucier v. Katz 533 U.S. 194 (2001)	*passim*
Skrtich v. Thornton 280 F.3d 1295 (11th Cir. 2002)	5, 6
Whitley v. Albers 475 U.S. 312 (1986)	4, 5, 8, 9
Willingham v. Loughnan 321 F.3d 1299 (11th Cir. 2003)	6

Constitutional Provisions

U.S. Constitution
Eighth Amendment *passim*

QUESTION PRESENTED FOR REVIEW

The Ninth Circuit found that a correctional officer who shot a prisoner in the leg during a prison fight was entitled to qualified immunity because he could reasonably believe that his conduct did not violate clearly established law. The question presented is:

Did the Ninth Circuit correctly apply the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001)?

STATEMENT OF THE CASE

This case stems from a melee on a California prison exercise yard during which inmate Vincent Marquez was shot and wounded by Officer Gutierrez. The Ninth Circuit granted Officer Gutierrez qualified immunity, finding that he could have reasonably believed his actions were lawful. Petitioner now challenges the applicability of qualified immunity in an excessive force case when a court has found that a constitutional violation occurred.

The melee occurred when Vincent Marquez, 200 to 300 other inmates, and two or three officers were on an exercise yard at the California State Prison in Sacramento. A group of inmates approached Marquez and the inmates with whom he was standing. ER 379. A fight then ensued between about ten inmates from rival Hispanic groups, none of whom had weapons. Marquez was in the middle of the brawl, with groups of inmates fighting around him. Although he alleged in his complaint that he fought back, he later testified that he defended himself by blocking the blows of inmates who came toward him and by trying to move away from the fights; he did not hit or kick anyone during the altercation. ER 54; 384.

Officer Gutierrez was in a guard tower 360 feet away on the opposite side of the yard when he saw the fight and yelled for the inmates to get down on the yard. Another officer was about 100 yards away when he heard Officer Gutierrez's order and began running toward the altercation, also yelling for the inmates to get down. A third officer on the yard responded and ordered inmates to get down. The inmates did not obey the officers' orders and the fight continued. ER 386.

Officer Gutierrez then got his rifle from a gun rack and again yelled for the inmates to get down. The inmates on the yard, except for those where the fight was happening, got on the ground. ER 385. Officer Gutierrez focused on three inmates, one of whom–an inmate later identified as Perez–was on the ground. Officer Gutierrez saw an inmate whose back was to him making what he believed were kicking motions toward Perez's head and upper body. Another inmate was doing the same toward Perez's lower body. Perez's body was moving with the blows and Officer Gutierrez did not believe that Perez was defending himself, although Perez later said he was either on the ground trying to ward off the blows or trying to get to his knees.

Officer Gutierrez felt that if the attack continued, Perez could be killed or seriously injured. In a previous unrelated incident, Officer Gutierrez had seen an inmate's jaw broken with a single kick. He decided to fire a shot at the lower body of the inmate closest to Perez, who was kicking Perez in the head, because he thought that inmate was the greatest threat. The shot struck Marquez in the left leg, fracturing his femur. Another inmate, Garcia, later said that he was one of the inmates Officer Gutierrez saw kicking Perez, but that Marquez was not involved. ER 385-86.

Before the shot was fired, Marquez had heard officers order the inmates to get down at least twice. He was within three to four yards of Perez at the time the shot was fired. Marquez gave two accounts of his actions just before the shot was fired. In one, he claimed that he was trying to get on the ground as ordered, when he tripped over another inmate's head and was shot while falling to the ground. In the other, he claimed he was moving around on his knees trying to get away from the fights when he was shot. Marquez said he was

in the "wrong place at the wrong time," and just happened to be the inmate that was hit. He did not know whether Officer Gutierrez was trying to kill or hurt someone, or simply trying to break up the fight, when the shot was fired. ER 70-73.

All but two of the inmates stopped fighting and got on the ground when the shot was fired. The other two continued to fight for a brief time before complying with the orders of other officers who were just arriving at the location of the fight. ER 72.

Marquez was found on the ground near Perez and Garcia. Perez suffered contusions of the lower lip, chin, back of the neck, and abrasions to both elbows. ER 223; 214.

The Ninth Circuit determined that Officer Gutierrez was entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194 (2001), and Ninth Circuit precedent of *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001), because a reasonable officer in his position could have believed that shooting one inmate in the leg to stop an assault that could have seriously injured or killed another inmate was a good-faith effort to restore order. *Marquez v. Gutierrez*, 322 F.3d 689, 693 (9th Cir. 2003).

REASONS FOR DENYING THE PETITION

I.

THERE IS NO CIRCUIT SPLIT ON THE AVAILABILITY OF QUALIFIED IMMUNITY IN EIGHTH AMENDMENT EXCESSIVE FORCE CASES, AND THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Petitioner argues that there is a circuit split on the availability of qualified immunity in Eighth Amendment excessive force cases and that the Ninth Circuit's decision in this case is inconsistent with this Court's decisions on qualified immunity. There is no circuit split because the Eleventh Circuit cases that petitioner cites as creating one were decided before this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), which provided direction to that circuit on the qualified immunity issue. And the Ninth Circuit is not in conflict with this Court because it correctly applied the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), by separating the qualified immunity inquiry into two parts and not ending the analysis after it found a constitutional violation.

In ruling on qualified immunity a court must consider the threshold question of whether the facts, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201. The Ninth Circuit followed that precedent and first analyzed whether Gutierrez violated the Eighth Amendment by using excessive force. *Marquez*, 322 F.3d at 692. In doing so, it properly applied the test established in *Whitley v. Albers*, 475 U.S. 312 (1986). Under that test,

where a prison security measure is undertaken to resolve a disturbance and poses significant risks to the safety of inmates and prison staff, the question of whether the measure violates the Eighth Amendment's prohibition on cruel and unusual punishment turns on whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Whitley*, 475 U.S. at 320-21.

The Ninth Circuit found that, on his version of the facts, Marquez could show an Eighth Amendment violation. *Marquez*, 322 F.3d at 692. Petitioner argues that once a court makes that finding, qualified immunity is not available in excessive force cases under the Eighth Amendment because, under *Whitley*, that finding necessarily forecloses a finding that an officer could reasonably believe that his conduct did not violate clearly established law. This is the same argument this Court considered and rejected in *Saucier*. Even if a court were to hold that an officer violated the Fourth Amendment by using unreasonable–and therefore excessive–force, the officer would still be entitled to qualified immunity for a reasonable mistake as to the legality of his action. *Saucier*, 533 U.S. at 206.

Petitioner argues, citing *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002) and *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002), that *Saucier* is distinguishable because it involved an excessive force claim under the Fourth Amendment's objective test for reasonableness, rather than the Eighth Amendment's test which contains a subjective element of intent. Petitioner's argument fails because both *Johnson* and *Skrtich* were decided before, and without the benefit of, this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In that case, this Court held that despite their participation in

conduct deliberately indifferent to a prisoner's safety under the Eighth Amendment, officers "may nevertheless be shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope*, 536 U.S. at 738-39 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Following *Hope*, the Ninth Circuit has held that even though the constitutional issue turned on the officer's state of mind, the court still had to consider whether, assuming the undisputed facts in the party's favor, it would be clear to a reasonable officer that his conduct was unlawful. *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1045 (9th Cir. 2002). This is as true for Eighth Amendment cases as for Fourth Amendment cases. *Id.* at 1049 (citing *Hope*, 536 U.S. at 735-41). To the extent that *Johnson* and *Skrtich* are inconsistent with *Hope*, they are no longer good law.

Moreover, the Eleventh Circuit acknowledged that *Hope* changed the law in that circuit. *Willingham v. Loughnan*, 321 F.3d 1299, 1300 n.1 (11th Cir. 2003). Respondent has found no post-*Hope* cases in the Eleventh Circuit that hold that qualified immunity is not available in excessive force actions under the Eighth Amendment, and petitioner concedes that no other circuits have reached that conclusion.

The Ninth Circuit correctly decided that qualified immunity is available in Eighth Amendment excessive force cases, even if the facts construed in the light most favorable to the injured party are sufficient to show a violation. There is no conflict in the circuits on that question.

II.

THE NINTH CIRCUIT PROPERLY APPLIED *SAUCIER* BY ANALYZING HOW A REASONABLE OFFICER COULD HAVE PERCEIVED THE PRISON DISTURBANCE AND THE APPLICABLE LAW

Petitioner argues that if a court assumes the facts in the light most favorable to the plaintiff and finds that an officer's conduct was malicious and sadistic, it is inconsistent to then grant qualified immunity because it would never be reasonable for an officer to act maliciously and sadistically. That argument ignores that the second *Saucier* inquiry–whether under clearly established law an officer could believe his conduct was lawful–must be viewed from a reasonable officer's perspective of the situation that confronted him at the time. How the officer perceived the situation at hand necessarily influences the officer's belief as to the lawfulness of his conduct.

The Ninth Circuit did not "recast" the facts, as petitioner argues, rather it determined whether a reasonable officer in the circumstances facing Officer Gutierrez would have known that shooting Marquez violated clearly established law. *Marquez*, 322 F.3d at 693. It is undisputed in this case that the officer was approximately 360 feet away from the multiple fights, that numerous inmates were involved, and that at least one inmate was kicking another inmate. ER 386; Pet. at 3. As the Ninth Circuit correctly pointed out, even if the officer's beliefs as to the dangerousness of the situation were mistaken, he can still be entitled to qualified immunity if a reasonable officer in his situation could have believed that force was necessary and, therefore, lawful.

And contrary to petitioner's argument, the Ninth Circuit was more than generous in the facts it construed in plaintiff's favor. In fact, it is doubtful that an excessive force claim under the Eighth Amendment was made out at all because the facts are remarkably similar to *Whitley*, and there is virtually a complete absence of facts to support an inference that the shot was fired maliciously and sadistically to cause harm, rather than in a good-faith effort to restore discipline during a prison disturbance.

In *Whitley*, this Court found that defendant was entitled to qualified immunity where, during a prison disturbance, he told other officers to shoot low at any prisoner climbing the stairs after him, as he went up to rescue a hostage. *Whitley*, 475 U.S. at 322-26. A warning shot was fired, but a group of inmates did not get down and instead ran up the stairs after the officer. *Id.* An officer then shot low into the group and hit an inmate in the leg even though it later became apparent that the inmate was not actively involved in the riot, but was simply trying to get back to his cell. *Id.*

Here, the Ninth Circuit nevertheless found that petitioner could make out an excessive force claim because he allegedly was passive and unarmed and merely standing near a fight between other unarmed inmates when no inmate was in danger of great bodily harm.

Under *Whitley*, however, and the Ninth Circuit's own precedent in *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001), a reasonable officer in Gutierrez's position could believe that his conduct did not violate clearly established law. *Marquez*, 322 F.3d at 693. In *Jeffers*, a racial disturbance broke out between Hispanic and Black inmates at the same prison and on the same exercise yard as in *Marquez*. *Jeffers*, 267 F.3d at

901. Jeffers was attacked by another inmate with a knife-like weapon during the disturbance. *Id.* at 912. While he was defending himself, he was unintentionally hit by a shot fired by officers attempting to control the disturbance. *Id.* Plaintiff himself believed that he was not shot intentionally. *Id.* Citing *Whitley*, the *Jeffers* court found that the officers' actions in firing their guns in plaintiff's vicinity were good-faith efforts to restore discipline, rather than malicious and sadistic acts. *Id.*

In *Marquez*, the Ninth Circuit found that Officer Gutierrez could have reasonably concluded that his decision to shoot an inmate in the leg to stop an assault that could have seriously injured or killed another was a good-faith effort to restore order, even if, in hindsight, he was mistaken regarding Marquez's involvement and the degree of the danger to Perez. *Marquez*, 322 F.3d at 693. That conclusion is consistent with this Court's decisions on qualified immunity and is not in conflict with the law in another circuit.

An Eighth Amendment violation was not obvious, and *Whitley* and *Jeffers* did not provide fair warning to Officer Gutierrez that his decision to shoot in the circumstances facing him was unlawful. *See Hope*, 536 U.S. 738-45. The Ninth Circuit's grant of qualified immunity, therefore, was correct.

CONCLUSION

This Court should deny the petition for certiorari because there is no conflict in the circuits and the Ninth Circuit's decision is consistent with this Court's precedent.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
FRANCES T. GRUNDER
Senior Assistant Attorney General
MICHAEL G. LEE
Supervising Deputy Attorney General
STEPHEN W. PERKINS, SBN 80522

Attorneys for Respondent